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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 53

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, *Petitioner*,

v.

THE FAFNIR BEARING COMPANY, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The decision and order of the National Labor Relations Board is reported at 146 NLRB 1582. The opinion of the United States Court of Appeals for the Second Circuit, denying petitioner's motion to intervene in the review proceedings in that court, is reported at 339 F. 2d 801 and appears at R.16.

Jurisdiction

The order of the Court of Appeals denying leave to intervene was entered on the same day as the rendition of the opinion, December 24, 1964. The petition for a writ of certiorari was filed on February 5, 1965, and was granted on March 29, 1965. 380 U.S. 950; R. 23. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented

When the National Labor Relations Board upholds a union's unfair labor practice charge against an employer and, following proceedings in which the union participated as a party, issues a cease and desist order directed at the employer, does the union have a right to intervene in judicial review proceedings brought by the employer, pursuant to § 10 (f) of the National Labor Relations Act, wherein the union's statutory rights will be finally determined?

Statute Involved

Section 10 (f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160 (f), provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside . . . Upon the filing of such petition, the court shall proceed in the

same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Statement

This case, like its companion No. 18, Oct. Term 1965, *International Union* v. *Scofield,* involves the appellate intervention rights of a party who has prevailed in proceedings before the Labor Board. The only difference is that the party seeking intervention in No. 18 is the one charged with having committed an unfair labor practice, whereas the party seeking intervention in the instant case is the charging party, having charged another with committing an unfair labor practice.

It is against the backdrop of the unfair labor practice proceeding before the Board that the intervention issue before this Court must be viewed. The facts underlying the merits are not in dispute. They were summarized by the Labor Board as follows:

(1) The Company and the Union had been parties to collective bargaining agreements since 1944. The agreement currently in effect contained an incentive wage clause, providing for the establishment of standard production rates that would reflect the number of pieces produced by an employee working with normal incentive. Employees who exceeded the standard rate were entitled to compen-

sation in excess of the regular hourly wage commensurate with the additional production. It was the Company's obligation to fix the standard rates. 146 NLRB at 1582-1583.

(2) The standard production rates were fixed by industrial engineers (called ratesetters) employed by the Company. This process required the ratesetters to utilize both objective observation of the production process (such as measuring machine speed) and subjective judgment (such as judging employee fatigue). 146 NLRB at 1583.

(3) The agreement also provided a grievance procedure, culminating in arbitration, for disputes over the setting of the standard rates. The permanent arbitrator was himself an industrial engineer who had in the past conducted independent time studies of operations involved in grievances. 146 NLRB at 1583.

(4) The instant case involved four disputes respecting the establishment of standard rates. At the final step in the grievance procedure, prior to arbitration, the Union's expert industrial engineer requested and received from the Company the time-study data prepared by the Company's industrial engineers. After studying this data and finding it incomplete and therefore unsatisfactory, the Union's engineer informed the Company that he was unable to advise the Union whether, in his opinion, the rates set for the disputed operations were in conformity with the provisions of the collective bargaining agreement and thus could not advise the Union whether to proceed to arbitration of the grievances. He accordingly asked permission to perform his own time study in order to enable him to advise the Union in these respects. 146 NLRB at 1583-1584.

(5) The Company denied the request on grounds that the additional study was unnecessary, that the contract did not grant the Union the right to make an independent

time study, and that the arbitrator would conduct his own time study. The Company's position was that all four of the grievances were subject to arbitration; the Company then offered to arbitrate them all. 146 NLRB at 1584.

The petitioner Union thereupon filed a charge with the Labor Board, alleging that the refusal to permit the Union time study of the four jobs was in violation of Sections 8 (a) (1) and (5) of the Act.[1] The General Counsel of the Labor Board, acting through a regional director, issued a complaint. A hearing was thereafter held before a trial examiner. All parties, including the petitioner Union,[2] were represented at and participated in the hearing and had full opportunity to introduce evidence, subpoena, examine and cross-examine witnesses, and present written and oral arguments. At this hearing the General Counsel supported the allegations of the complaint that the respondent Company had violated § 8(a) (1) and (5).

On September 26, 1963, the trial examiner issued a decision (see 146 NLRB at 1591-1599) finding that the respondent Company had not violated the Act as alleged in the complaint and recommending that the complaint be dismissed in its entirety. He reasoned that it is lawful for

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[1] Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights under Section 7 (such as the right to self-organization, to form or join labor organizations, and to bargain collectively). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. Refusal to supply information to make bargaining possible on an informed and intelligent basis is a "refusal to bargain." *Timken Roller Bearing Co.* v. *NLRB*, 325 F. 2d 746 (C.A. 6), cert. den. 376 U.S. 971; *N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260 (C.A. 2), cert. den. 375 U.S. 834.

[2] The petitioner Union, as the charging party, was a party to the proceedings pursuant to Sec. 102.8 of the Board's Rules and Regulations. That section defines the term "party", for purposes of Board proceedings, to include "any person filing a charge or petition under the act." 29 C.F.R. § 102.8.

parties to channel and direct their bargaining by consensual arrangements, that the parties had done so here in the bargaining agreement, and that the Union's recourse for "breach of contract" "lies either in arbitration or in litigation before a judicial forum empowered to interpret and enforce the Union's construction of the disputed text." The trial examiner additionally ruled that Section 8(a)(5) "does not impose upon an employer an obligation to acquiesce in a union's demands for an independent time study by such union after such employer has supplied it with all his relevant time studies." 146 NLRB at 1597.

Thereafter the General Counsel and the petitioner Union (as the charging party) filed exceptions to the trial examiner's decision, and briefs in support thereof; the respondent Company (as the charged party) filed a brief in support of the decision, as well as cross-exceptions and a brief in support thereof.

On May 13, 1964, the Labor Board, dividing 3-1,[3] entered a decision and order which declined to follow the trial examiner's recommendations and instead found that the respondent Company had violated § 8(a)(1) and (5) of the Act by refusing to permit the petitioner Union to perform a time study of the disputed operations. 146 NLRB 1582. An order was entered directing the Company to cease and desist from refusing to bargain collectively by refusing to permit the Union to perform the time studies and directing that the Company take certain affirmative action to effectuate the Union's right to conduct such studies. 146 NLRB at 1588.

The Board majority agreed with the trial examiner that the information which the Union sought was both relevant and necessary to enable the Union to make an intelligent decision whether to proceed to arbitration. But unlike the

[3] Member Jenkins took no part in the consideration of the case.

trial examiner, the Board majority ruled that the Company's refusal in the circumstances to allow the Union to make time studies constituted a violation of the Company's duty to bargain in good faith. This conclusion was premised on established precedent that § 8(a) (5) imposes a duty on the employer "to furnish upon request all information relevant to the bargaining representative's intelligent performance of its functions," an obligation that extends to information needed by the union "to police and administer existing agreements." 146 NLRB at 1585.

The Board further concluded that the Company's asserted justifications for refusing to grant the request were unsound. The collective bargaining agreement, while not expressly recognizing the Union's right to make time studies, did not prohibit such studies. And the Union had not waived its "statutory right to such information." 146 NLRB at 1585. The fact that if the matter went to arbitration the arbitrator would perform his own time studies was not a substitute for the Union's right to do so itself. Thus, concluded the Board, the benefit to the Union in making its own study—both to decide whether to arbitrate and to prepare its case for possible arbitration—"are not so tenuous or insubstantial as to warrant our declining to support the Union's statutory claim to the information sought." 146 NLRB at 1586.

The dissent of Member Leedom, 146 NLRB at 1588-1591, was premised upon the belief that the Union should not be allowed access to production areas while employees are working in the absence of proof that denial of access would constitute an unreasonable impediment to the Union's exercise of its statutory rights. He felt that the past history of the parties' relationships and the alternative sources of information available to the Union showed that such access was unnecessary. To this the majority responded that the Company had failed to show that access

to production areas—where time studies of necessity must be conducted—would interfere with production or discipline, and that upon a balancing of interests the Union's statutory right to this information outweighed any of the Company's property rights or other interests. 146 NLRB at 1586-1587.

The Company filed a motion for reconsideration, to which the General Counsel and the petitioner Union filed objections. The Labor Board denied the motion. R. 3.

Thereafter on October 9, 1964, the respondent Fafnir Bearing Company filed in the Court of Appeals for the Second Circuit a petition for review of the Board's decision and order pursuant to § 10(f) of the Act. R. 1-6. The petition named only the Board as respondent. The Fafnir Company contended then, consistent with its earlier positions, that "the parties' contractual grievance procedure" was the exclusive remedy for the resolution of the disputes. R. 4. Among the other assignments of error which the petition designated as the basis for review were (1) the Board's holding that the Union "has an absolute, statutory right of access to the production areas of the Company's plant during working hours, for the purpose of making independent time studies of disputed operations by its own expert to investigate and verify time study data already furnished to the union by the company"; and (2) the Board's holding that the Company "refused to bargain in good faith by denying access to production areas of the company's plant during working hours to a union industrial engineer, for the purpose of making independent time studies . . ." R. 3. The petition concluded by praying that the Board's decision and order be in all respects set aside and the petitioner Union's complaint dismissed. R. 6.

The Board filed its answer (R. 7), asserting that its order was in all respects valid and proper under the Act.

This answer was joined with a cross-petition for enforcement of the Board's order. The petitioner Union then filed a petition for leave to intervene. R. 9. This petition set forth the following as grounds for intervention:

(1) The Union would be bound by the decision of the Court and an adverse decision would deprive it of the substantial benefit gained from the Board's order. R. 10.

(2) The Union's interest in the case could be represented adequately only by the Union itself. It was the Union's contract, the Union's bargaining status and the Union's members that would be jeopardized by the employer's refusal to bargain in good faith; and those interests should be advanced by the Union on its own behalf. It was noted that a compelling reason for intervention was the standing the Union would thereby acquire to seek certiorari from an adverse court decision, particularly if the Board declined to seek certiorari. R. 10-11.

(3) The matter in issue was of tremendous importance not only to this particular Union but to other unions throughout the United States having similar problems. R. 11.

(4) In the event of an adverse court ruling and a remand to the Board for dismissal of the complaint, the Union would have the right to seek a new review under § 10(f) as an aggrieved party. Thus intervention at this stage would avoid a multiplicity of proceedings. R. 12.

(5) Intervention would cause no delay or prejudice to the parties; nor would it complicate the proceedings. R. 12.

Both the Board and the Fafnir Company filed oppositions to the motion for leave to intervene. See R. 13 and R. 15. The Board's opposition stated that as "a matter of policy" the Board has consistently opposed intervention by charging parties in support of Board orders "because enforcement proceedings are public proceedings

for the vindication of public rights." R. 14. Claiming that the petitioner Union was not a party "aggrieved by the Board's order," the Board's opposition argued that no purpose would be served by permitting intervention; "private parties have no rightful place" in this type of proceeding "except as the Court may decide to avail itself of helpful suggestions." R. 14. It was suggested that the Union be given leave to file a brief as *amicus curiae*. R. 14.[4]

The Fafnir Company's opposition simply stated that "the Union has no standing as a party to this review proceeding in that it is not a 'person aggrieved' under Section 10(f) of the National Labor Relations Act". R. 15.

On December 24, 1964, following oral argument on the motion for leave to intervene, the Second Circuit rendered an opinion denying the motion, with leave to the Union to file a brief as *amicus curiae*. R. 16; 339 F. 2d 801. That opinion, written by Circuit Judge Friendly, is now under review by this Court.

Summary of Argument

In the companion case, *International Union* v. *Scofield*, No. 18, Oct. Term 1965, the question is whether the silence of Congress in § 10(f) of the National Labor Relations Act should be interpreted to give a *charged* party the right to intervene in judicial review proceedings brought by the *charging* party. Here the question is whether the *charging* party should be permitted to intervene in judicial review proceedings brought by the *charged* party. While

[4] The Board's policy position opposing intervention by "charging" parties but favoring intervention by "charged" parties is analogous to the discredited "negative order" concept that once applied to judicial review of administrative decisions, i.e., "Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person". *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 130.

these two questions involve differing considerations, the answers in both instances should be the same. It is fundamentally unfair and inequitable that any party to Labor Board proceedings, be he the charged party or the charging party, should be precluded from full participation in judicial review proceedings wherein his direct interests and statutory rights will be authoritatively resolved. And the proper administration of § 10(f) would seem to require such intervention in order to effectuate the demands of fairness, to permit the affected party to take advantage of full appeal rights, and to avoid a multiplicity of litigation.

A

The Labor Act recognizes private rights within a framework of the public interest. Private rights and public rights concepts interblend throughout the statutory proceedings. There is shared responsibility with primary authority vested at various stages first here and then there, first in the private domain and then the public.

This Court's decision in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (the chief authority relied upon below) does not require a formal or rigid distinction between public interest and private rights in each and every instance. There, this Court demonstrated flexibility in this regard. The Court held that private parties who initiate unfair labor practice charges lack standing to seek contempt action by the court which enforces the Labor Board order; but this Court in the same decision acknowledged the right of the same private parties to intervene in the appellate review proceedings when the merits of the Labor Board decision were in issue. 309 U.S. at 263.

The repeated emphasis upon the public interest involved in the Labor Act and the Labor Board's exclusive function

in enforcing that public interest is simply a means of distinguishing and rejecting private efforts to disturb the Board's exclusive functions, to utilize the Board's procedures for adjudicating claims outside the statutory reach, or to prosecute claims in other forums which cut across matters preempted by Congress. The public interest concept is but a shorthand method of referring to those aspects of the Act relating to the exclusivity of the Board's jurisdiction and procedures. *It does not imply the absence of private interests or claims within the public arena.* Nor does it exclude the possibility that, consistent with the Act, certain private rights may be pursued either before the Board or alternatively before some other forum.

Indeed, the whole concern of the Labor Act is to recognize, in the public interest, certain rights and obligations of both labor and management. Those reciprocal rights and obligations are the very content of the Act. Section 7 of the Act, 29 U.S.C. § 157, for example, expressly recognizes the "right" of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . . and . . . to refrain from any or all of such activities . . ." And Section 8, 29 U.S.C. § 158, creates a host of obligations and correlative rights as to both employers and unions; the duties and restraints therein imposed by way of prohibiting unfair labor practices create a manifold compendium of private interests subject to statutory adjudication.

B

There are very real private rights at stake in this case. Basically the right involved is that recognized in § 7 of the Act, the right to bargain collectively with an employer. Only with the time-study information requested by the

Union, as the Board found, could the Union "fulfill its function as the bargaining representative."

At least twelve times during the course of the Board's opinion the Union's interest in this matter is referred to as a statutory right of the Union. See 146 NLRB at 1585-1587. The opinion is replete with such references as the Union's "statutory right to such information," its "statutory claim to the information sought," the employer's "denial of rights guaranteed under the Act," and "the denial of the statutory right here involved."

While it may be said that the Union's statutory right became impressed with public policy considerations, enabling the Board to recognize and enforce it, that right or interest remained as an object of parochial Union concern. The Union's interest has both public and private connotations; the latter requires intervention in both the Board and appellate court proceedings.

C

Practical considerations require intervention, upon request, by a party charging violation of the Labor Act. Just as in the companion *Scofield* case, review by the appellate court generates several practical reasons why intervention should be allowed to the charging party as a matter of effective and expeditious administration of § 10(f).

Petitioner Union's interest will be protected in this first appeal to the court below or not at all. Although petitioner might take an appeal from a Board dismissal of the complaint after a remand from an unfavorable decision of the court below, as a practical matter the second proceeding would be controlled by the facts found and the legal conclusions reached in the first proceeding. Without according the Union the right to assert and litigate its interests

in the first proceeding, there can be no assurance that those interests will ever be objectively considered in the light of the Union's contentions or that they will be given the weight in appellate proceedings to which they are entitled.

Intervention by the Union in the court below will bring all the interested parties before the court; it will provide the court with the facts and considerations underlying the need for the time-study information—as only the Union can present this need. Furthermore, intervention at this stage would avoid a multiplicity of proceedings by eliminating the possibility as well as the futility of the Union seeking an additional appeal from a Board order dismissing the complaint in the event the court below should reverse the Board's outstanding decree.

Since the Union's statutory rights are about to be authoritatively adjudicated, the accepted notions of appellate court equity require that it "be given an opportunity to be heard . . ." *Davis* v. *Mercantile Trust Co.*, 152 U.S. 590, 593. This opportunity to be heard means full participation as a party and not simply the right to file a brief *amicus curiae;* it means full participation in the court below and the right to seek certiorari in this Court. Intervention below guarantees that the entire controversy will be centralized and confined in one proceeding, enabling both the court below and this Court to review all relevant issues in the light of the contentions of all the interested parties.

Furthermore, the Union's right to participate in the appellate proceedings should not be precluded by the fortuity of its success before the Board. If the Union's complaint against the respondent Company had been dismissed by the Board, it could have appealed to the court below as an "aggrieved" party. Yet the statutory claims and rights that the Union would be asserting as such an "aggrieved" party are precisely the same as the claims and rights it is

now seeking to assert. Reality, not fortuity, should determine intervention rights.

Finally, intervention in the court below would conform to the general congressional policy favoring intervention. Congress has manifested this policy in allowing intervention in Board proceedings. It has manifested this policy in allowing intervention in judicial review proceedings from other agencies. See 28 U.S.C. 2323; 5 U.S.C. 1038. And this policy of Congress is further enunciated in Rules 19 and 24 of the Federal Rules of Civil Procedure. It appears only reasonable to read this policy of Congress into the judicial review provisions of § 10(f) of the National Labor Relations Act. The silence of § 10(f) with respect to intervention cannot be taken as a rejection of the uniform policy favoring intervention adopted whenever Congress expressly directed its attention to that subject.

Argument

The failure of Congress specifically to mention the right of directly affected parties to intervene in judicial review proceedings under § 10(f) of the National Labor Relations Act has created the two problems now before this Court:

(1) Does the party charged before the Labor Board with having committed an unfair labor practice have a right to intervene in the judicial review under § 10(f) of a Board order dismissing the charge? That is the question to be answered in the case companion to the instant one, *International Union* v. *Scofield,* No. 18, Oct. Term 1965.

(2) Does the charging party before the Board, the party who has charged another with having committed an unfair labor practice, have a right to intervene in the judicial review under § 10(f) of a Board order finding

that such an unfair labor practice has been committed and directing the other party to cease and desist therefrom? That is the question to be answered in this case.

While these two questions involve differing considerations, the answers in both instances should be the same. It is fundamentally unfair and inequitable that any party to Labor Board proceedings, be he the charged party or the charging party, should be precluded from full participation in judicial review proceedings wherein his direct interests and statutory rights will be authoritatively resolved. And the proper administration of § 10(f) would seem to require such intervention in order to effectuate the demands of fairness, to permit the affected party to take advantage of full appeal rights, and to avoid a multiplicity of litigation. In these circumstances, as in the *Scofield* case, the equitable requirements that must be deemed incorporated in § 10(f)[5] require intervention when requested by the party whose interests are directly at stake.

In short, as was said by the Report of the Advisory Panel on Labor-Management Relations Law to the Senate Labor Committee in 1960, authored by a distinguished group under the chairmanship of Professor Archibald Cox,[6] "We also believe that any party to NLRB proceedings should be allowed to intervene in the appellate proceedings. This would clarify an uncertain issue."

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[5] Where a statute, like 10(f), requires a judicial type hearing but is silent about the details of such a hearing, it must be assumed that Congress intended the hearing to be in conformity with the requirements of equity and due process. *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 182; *The Japanese Immigrant Case*, 189 U.S. 86, 101; *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 107-108; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49.

[6] S. Doc. No. 81, 86th Cong., 2d Sess. (1960), p. 17. Members of this Cox Committee include David L. Cole, Guy Farmer, Arthur Goldberg, Charles Gregory, Denison Kitchel, Plato E. Papps, Gerard Reilly, Louis Sherman, Russell A. Smith, George W. Taylor, and W. Willard Wirtz.

These experts of labor-management relations based this recommendation on the following rationale: "Although proceedings before the NLRB are undertaken in the public interest, since 1947 they have also been concerned with the vindication of essentially private rights. The Board is no longer charged solely with promoting the spread of labor unions and collective bargaining. It is largely an umpire engaged in enforcing established rules first against one party and then against the other. Unions often intervene in NLRB proceedings in order to press complaints of unfair labor practices against employers . . . Unfair labor practice cases against unions have supplanted employers' private suits for injunctions against unlawful strikes, boycotts, and picketing." S. Doc. No. 81, n. 6, *supra,* at p. 5.

As thus noted, the realities of Labor Board proceedings, and judicial review of those proceedings, indicate a clash of private interests seeking vindication of statutory rights before impartial public tribunals. The independent General Counsel,[7] with an eye on his docket, his case load, and his over-all responsibilities, aids first one party and then another. Both the General Counsel and the Board represent the over-all public interest in umpiring the individual private rights of management and labor. Such umpiring in the public interest does not detract from the private rights which warrant intervention in the court below.

[7] Section 3(d) of the Act creates a General Counsel of the Board, appointed by the President, with "general supervision over all attorneys employed by the Board" and "final authority . . . in respect of the investigation of charges and issuance of complaints".

A. *The Labor Act Recognizes Private Rights Within A Framework of the Public Interest*

Underlying the decision below and central to the policy of the Board in opposing intervention by a charging party who had prevailed in Board proceedings is the assumption that only public rights are involved under the Act and that no private rights or interests are in focus at the appellate review stage; hence any interest of the charging party is necessarily encompassed by the public rights assertable only by the Board and intervention by the charging party becomes inappropriate. But this public interest/private rights dichotomy is too wooden an answer to the viable issues here presented. As Mr. Justice Frankfurter commented in *Labor Board* v. *Avondale Mills,* 357 U.S. 357 at 364: "Mechanical answers will not avail for the solution of this non-mechanical complex problem in labor-management relations".

The "public rights" concept has had an evolutionary development, a development which indicates that there is no inconsistency in permitting intervention by private parties in NLRB review proceedings.

The rights to self-organization and to collective bargaining long antedated the Wagner Act of 1935. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184; *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1; *Texas & N.O.R. Co.* v. *Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548. These rights were "protected" by Congress in the Wagner Act, and the legislative history concerning the public interest/private rights dichotomy shows that no one thought to foreclose judicial intervention by private parties when their "protected rights" were at stake.

The bill originated in 1934 with a proviso that Labor Board orders would be enforced in the District Courts by the United States Attorneys "at the request of the

National Labor Board" (Legislative History of the National Labor Relations Act, 1935, p. 4). This procedure was similar to that authorized by the labor provisions in the National Industrial Recovery Act (Id. at p. 534). Francis Biddle and others with experience testified against the difficulty and delay of "trial de novo" in the District Courts (Id. at p. 2650), and employer witnesses challenged the constitutionality of a procedure without trial *de novo*. They alleged a Seventh Amendment right to trial by jury, and referred to court decisions requiring a judicial trial in reparation proceedings under the Interstate Commerce Act and under the Packers and Stockyards Act (Testimony of Robert F. Colley, of the American Rolling Mill Co., Id. at 1831; testimony of James A. Emery, General Counsel of the NAM, Id. at 2235). The NAM spokesman distinguished the situation under the Federal Trade Commission Act because that Act involved the "enforcement of public rights, which in their nature do not require judicial determination" (Id. at 2236).

This "public rights" concept was at once adopted by the bill's champions, and the provisions for *de novo* trials and District Court enforcement by the United States Attorneys were eliminated in favor of the Court of Appeals enforcement route of the Federal Trade Commission Act (Id. at 2295). The final House Report, for example, makes this explanation of the judicial enforcement and review provisions:

> "The procedure provided is analogous to that in the Federal Trade Commission Act and is familiar to all students of administrative law . . . The most frequent form of administrative action required in cases of this type is specifically provided for, i.e., the reinstatement of employees with or without back pay, as the circumstances dictate. No private right of action is contemplated. Essentially the unfair labor

practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint . . .". (Id. at 2931).

Thus, the "public rights" concept originated to forestall the delay incident to "jury trials".[8] It was intended and has been applied to give exclusivity in certain areas of Labor Board proceedings, joint participation in others. This is and has been the statutory pattern. There is shared responsibility with primary authority vested at various stages first here and then there, first in the private domain and then the public.

Private parties, as petitioner Union here, initiate the Labor Board proceedings with the filing of a charge. The General Counsel of the Board has the "final authority" to investigate the facts underlying the charge, and to determine whether a "complaint" shall issue. Section 3(d). Upon the General Counsel's issuance of a complaint, the cases moves into the province of the Labor Board which may amend the complaint "in its discretion at any time prior to the issuance of an order based thereon". Section 10(b). The Labor Board may dismiss a complaint, or may issue an order based thereon; and "until a transcript of the record in a case shall have been filed in a court", the Labor Board may "modify or set aside . . . any order made or issued by it". Section 10(d). When the case moves on to appellate review, "the jurisdiction of the court shall be exclusive". Section 10(e).

Such in skeletal form is the statutory outline dividing the functions of the respective parties and agencies of government. But this statutory form is not complete.

[8] See e.g. the holding in *Labor Board* v. *Jones & Laughlin Steel Corp.* that an order to reinstate with back pay is not a "suit at common law" requiring a jury trial within the meaning of the Seventh Amendment. 301 U.S. 1, 48.

There is super-imposed a judicial gloss. Despite the statutory finality given the General Counsel and the Labor Board, the rights of private parties are preserved. Private parties are entitled to participate in the proceedings leading up to Labor Board compromise and settlement of pending cases. *Textile Workers Union of America, AFL-CIO* v. *National Labor Relations Board*, 294 F.2d 738 (App. D.C.); *Retail Clerks Union 1059* v. *National Labor Relations Board*, — F. 2d — (App. D.C., decided June 29, 1965); *Marine Engineers' Ben. Assn.* v. *NLRB*, 202 F.2d 546 (C.A. 3).[9] Private parties are entitled to seek court review to protect their interests if the Labor Board certifies a bargaining unit in violation of statutory command, *Leedom* v. *Kyne*, 358 U.S. 184; if the Labor Board refuses to exercise jurisdiction where jurisdiction exists, *Hotel Employees Local No. 255* v. *Leedom*, 358 U.S. 99; or if the Labor Board exercises jurisdiction where jurisdiction does not exist, *McCulloch* v. *Sociedad National*, 372 U.S. 10. Thus, even in the area of representation elections and unfair labor practices, this Court has recognized the existence of "private rights" and the consequent standing of injured parties to initiate and to participate in judicial review of Board action.

There are other areas where private rights and public interest concepts interblend, the areas of arbitration and judicial redress for breach of contract. Section 10(a) provides that the power of the Board to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise". Read literally, this would require all situations involving

[9] Of course, the private charging parties have no veto right over amendments to the complaint or compromise settlements once the Board has considered and explained reasons for rejection of the contentions made. See, e.g. *Local 282, International Brotherhood of Teamsters* v. *N.L.R.B.*, 339 F. 2d 795 (C.A. 2).

unfair labor practices to be adjudicated before the Labor Board. But this section is not read literally;[10] other sections of the National Labor Relations Act indicate further congressional policies. Title II, which created the Federal Mediation and Conciliation Service, declares that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing bargaining agreement". Title III allows suits by and against labor organizations in judicial forums. Indeed, the Company in this case urged before the Board that the Union should go to arbitration on its demand for time studies and the NLRB trial examiner found the Union's only recourse "in arbitration or in litigation". 146 NLRB at 1585. Had the Union followed this suggestion, it would be a party before the courts. The rights to be vindicated are identical whether the Union went the Labor Board route or the arbitration route suggested by the Company and the trial examiner.

In the *Steelworkers'* trilogy, 363 U.S. 564, this Court praised the grievance machinery under collective bargaining as "the very heart of the system of industrial self-government". *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581. When conflict arose between the private system of arbitration on the one hand and the exclusivity of the Labor Board remedies on the other, this Court saw no jurisdictional problem. The Court acknowledged the right of private parties to initiate and control arbitration and/or judicial action even when the issues involved were appropriate subjects for Labor Board action. *Smith* v. *Evening News Association*, 371 U.S. 195 (an unfair labor practice concededly within the jurisdic-

[10] See Harris, The National Labor Relations Board and Arbitration, the Battle of Concurrent Jurisdictions, 16 Syracuse L. Rev. 545 (1965).

tion of the Labor Board); *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (a question of "bargaining unit" where an alternative remedy before the Board was available).[11]

Thus, the statutory pattern does not require a formal or rigid distinction between public interests and private rights. The two may go hand in hand. In the 1947 Taft-Hartley amendments, Section 10(1) was added requiring the Labor Board to seek judicial injunctive relief against certain types of union unfair labor practices. Senator Taft explained that in these suits, the Labor Board acts "in the public interest and not in vindication of purely private rights." Legislative History of the Labor Management Relations Act, 1947 at p. 414. But despite the recitation of the "public interest" concept, the statute itself requires that notice of the Board's petition for an injunction "be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony."

This Court's decision in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (the chief authority relied upon below), does not require a formal or rigid distinction between public interests and private rights in each and every instance. There, this Court demonstrated flexibility in this regard. The Court held that private parties who initiate unfair labor practice charges lack standing to seek contempt action by the court which enforces the Labor Board order; but this Court in the same

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[11] In the *Carey* case, the brief of the United States conceded that "the existence of NLRB remedies does not preclude seeking a judicial or arbitrable remedy for the same or an overlapping controversy over the terms of a collective bargaining agreement . . . The bare fact that IUE might have sought similar relief under Section 8(a)(5) would not oust the court of jurisdiction to enforce the agreement to arbitrate". Brief, pp. 24-25.

decision acknowledged the right of the same private parties to intervene in the appellate review proceedings when the merits of the Labor Board decision were in issue. 309 U.S. at 263. The distinction between private interest to intervene and private interest to seek enforcement of court orders was reiterated in *International Union* v. *Eagle-Picher Mining Co.*, 325 U.S. 335, 338-39: "the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition."

That the Act reflects a public concern with the prevention of unfair labor practices and that the Board acts in certain instances as the sole and exclusive representative of that public interest are propositions that have been stated and restated in a variety of contexts by this Court.[12] But this Court in *Garner* v. *Teamsters Union*, 346 U.S. 485, warned against the seductive assumption that this dichotomy between public and private rights provides an answer to all assertions of private claims under the Act. "It often is convenient to describe particular claims as invoking public or private rights, and this handy classification is doubtless valid for some purposes. But usually the real significance and legal consequences of each term will depend upon

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[12] "The Board acts in a public capacity to give effect to the declared public policy of the Act," said the Court in *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 362, and the proceeding before the Board is accordingly "not for the adjudication of private rights." And the Board must be guided in its actions by the interests of the public; to permit those actions to be confined or controlled by private interests "would reduce the statutory machinery to a vehicle for the vindication of private rights," which "would be alien to the basic purpose of the Act." *Labor Board* v. *Fant Milling Co.*, 360 U.S. 301, 307. Moreover, the remedies appropriate or necessary to effectuate the public interest must be fashioned by the Board with due regard to the fact that "The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies." *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194; and see *Republic Steel Corp.* v. *Labor Board*, 311 U.S. 7, 11-12; *Nathanson* v. *Labor Board*, 344 U.S. 25, 27.

its context and the nature of the interests it is invoked to distinguish." 346 U.S. at 494. The term "public rights," the Court noted, has a variety of meanings as distinguished from "private rights". In the area of federal labor law, however, "the most usual differentiation is between the legal rights or duties enforced through the administrative process and those left to enforcement on private initiative in the law courts"—a distinction which "consists of substituting federal statute law applied by administrative procedures in the public interest in the place of individual suits in courts to enforce common-law doctrines of private right." 346 U.S. at 495-496.

It is within this context that the Court has spoken of the National Labor Relations Act as creating public rather than private rights. In every such instance the Court was dealing with an effort to assert a private claim which was either inconsistent with the statutory pattern or entirely outside the ambit of the statutory concern. Thus it became pertinent to note that the Act creates no "private right" to pursue a claim in such a manner.

The exclusive power which Congress has given to the Board to control certain crucial steps of its unfair labor practice procedures has given rise to many such statements as to the absence of private rights. As was pointed out in the *Amalgamated* case, 309 U.S. at 265, "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief." Accordingly, there can be no "private right" to control the Board's prosecution of an unfair labor practice case; to recognize such a right would be inconsistent with the exclusive powers given the Board.

The *Amalgamated* case is the perfect example of the nonexistence of such a "private right." There the union that had originally charged an employer with committing an

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unfair labor practice sought to have a court of appeals adjudge the employer guilty of contempt of the court decree enforcing the Board's order against the employer. Such an effort by a private party was completely inconsistent with the exclusive power lodged in the Board to secure enforcement of its own orders. When this Court emphasized that the Board was a public agency acting in the public interest and that Congress contemplated no private right of action in this area, 309 U.S. at 264, 267, it was underlining the proposition that within the statutory range there is no "private right" to secure enforcement of a Board order through contempt action. Enforcement of such an order is exclusively the function of the Board. "The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy,' " 309 U.S. at 269.

Contrariwise, in the *National Licorice* case, 309 U.S. 350, an effort was made by individual employees to secure an administrative determination, through participation in Board proceedings, of their private rights under a contract. In a situation where the exclusive public concern with the contract was with its use by the employer as a means of thwarting the bargaining rights of a union, this Court held that the Act provided no means for adjudicating such private claims of the individual employee signatories. But the Court was careful to note that the Act "does not foreclose the employees from taking any [other] action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication." 309 U.S. at 365.

Another facet of this refusal to recognize "private rights" under the Act is illustrated by the decision in *Garner* v. *Teamsters Union, supra,* where this Court was careful to make clear the need for delineating such rights in their context and in light of the nature of the interests sought to be distinguished. In that case an employer sought to obtain a state court injunction against peaceful

picketing, a matter which was within the Board's exclusive jurisdiction under the National Labor Relations Act. The employer sought to justify this effort on the theory that he was invoking a state equity power to protect a private right, whereas the Board was concerned only with enforcing a public right on behalf of the public interest. While it was questionable whether the state remedy was properly labeled one for the protection of private rights, the Court made plain that any such private right enforceable in a state court could not be recognized; the federal statute was supreme and could not be curtailed or circumvented by any such assertion of a private right. The public interest embodied in the Act was thus found to be both exclusive and supreme. 346 U.S. at 500-501. In this sense, the preemption doctrine recognized by this Court can be stated as a rejection of any "private right" to obtain relief in a forum and in a manner contrary to the Congressional mandate that the matter in issue be pursued only before the Board. See, e.g., *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Plumbers' Union* v. *Borden*, 373 U.S. 690.

In other words, the repeated emphasis upon the public interest involved in the Act and the Board's exclusive function in enforcing that public interest is simply a means of distinguishing and rejecting private efforts to disturb the Board's exclusive functions, to utilize the Board's procedures for adjudicating claims outside the statutory reach, or to prosecute claims in other forums which cut across matters preempted by Congress. The public interest concept is but a shorthand method of referring to those aspects of the Act relating to the exclusivity of the Board's jurisdiction and procedures. *It does not imply the absence of private interests or claims within the public arena.* Nor does it exclude the possibility that, consistent with the Act, certain private rights may be pursued either before the Board or alternatively before some other forum. See

Carey v. *Westinghouse Corp.*, 375 U.S. 261, 268, holding that a union's suit in a state court to compel arbitration regarding a representation matter was permissible; "a suit either in the federal courts, as provided by § 301 (a) . . . or before such state tribunals as are authorized to act . . . is proper, even though an alternative remedy before the Board is available . . ." See also *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448; *Smith* v. *Evening News Assn.*, 371 U.S. 195.

More importantly, there has not been and there cannot be any denial of the self-evident fact that the proper execution of the public policies of the Act, pursuant to the exclusive procedures of the Board, necessarily involves and effects the interests and rights of private parties under the Act. Private rights in this sense and in this context mean those rights which Congress has recognized as proper subjects of public concern and Board action and which the private parties are free to assert and to pursue. They are to be distinguished from those private claims which upset the statutory mechanisms or which are not the subject of public or statutory interest.

Indeed, the whole concern of this Act is to recognize, in the public interest, reciprocal rights and obligations of both labor and management. Those rights and obligations are the very content of the Act. Section 7 of the Act, 29 U.S.C. § 157, for example, expressly recognizes the "right" of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . . and . . . to refrain from any or all of such activities . . ." And Section 8, 29 U.S.C. § 158, creates a host of obligations and correlative rights as to both employers and unions; the duties and restraints therein imposed by way of prohibiting unfair labor practices create a manifold compendium of private interests subject to statutory adjudication.

The existence of this statutory type of "private rights" was made even more evident by the Taft-Hartley amendments in 1947, which imposed a series of obligations and restrictions on unions. The Act then became a body of bilateral rights and obligations with respect to unions and employers, with the Board assuming an even more pronounced role of adjudicating the conflicting claims of these private parties under the Act. As noted above, the Advisory Panel on Labor-Management Relations Law commented that:[18]

> ". . . although proceedings before the NLRB are undertaken in the public interest, since 1947 they have also been concerned with the vindication of essentially private rights. The Board is . . . largely an umpire engaged in enforcing established rules first against one party and then against the other."

To assert, protect or defend one's statutory rights in a manner consistent with the public policies and procedures lies at the very heart of the statutory scheme. In this context, therefore, "private rights" have "real significance and legal consequence," *Garner* v. *Teamsters Union*, 346 U.S. at 494, which are the proper concern of the Board and of reviewing courts.

B. *There Are Very Real Private Rights at Stake in This Case*

In this case the petitioner Union has a very substantial private interest at stake within the statutory framework. Basically the right involved is that recognized in § 7 of the Act, the right to bargain collectively with an employer. The charge was that, in violation of § 8 (a) (1) and (5), the respondent Company had infringed that right

[18] S. Doc. No. 81, 86th Cong., 2d Sess. (1960), p. 5.

by withholding information (available through the requested time studies) which would make the bargaining meaningful and would enable the Union to police and administer agreements reached through bargaining. Only with such information, as the Board found (146 NLRB at 1585), could the Union "fulfill its function as the bargaining representative".

At least twelve times during the course of the Board's opinion the Union's interest in this matter is referred to as a statutory right of the Union. See 146 NLRB at 1585-1587. The opinion is replete with such references as the Union's "statutory right to such information," its "statutory claim to the information sought," the employer's "denial of rights guaranteed under the Act," and "the denial of the statutory right here involved".

This right, this interest of the Union, was at all times pursued within the procedural framework of the Act. As a charging party, the Union was confined under the Act to the function of presenting a charge to the Board; and the Board thereafter had the exclusive functions of investigating, issuing a complaint, conducting a hearing and resolving the issue, followed by enforcing any affirmative order that might be issued against the employer. While it may be said that the Union's statutory right became impressed with public policy considerations, enabling the Board to recognize and enforce it, that right or interest remained as an object of parochial Union concern. The Union had the recognized right to participate in the hearings as a party, to file exceptions to any order of the trial examiner, and to file a petition for reconsideration to an order issued by the Board; and further, had the Board declined to recognize the statutory claims in any particular of the four jobs in dispute, the Union, as an aggrieved party, would have had the statutory right to seek vindication by judicial

review under Sec. 10(f). *Albrecht* v. *NLRB*, 181 F. 2d 652, 654 (C.A. 7).[14]

The very real concern of the Union, its interest in securing recognition of its statutory right, lost none of its force by virtue of the Board's decision acknowledging and enforcing that right. The critical fact is that the Union's rights under the statute were an integral part of the whole proceeding. Those were the rights that were adjudicated by the Board, as well as the employer's obligation to respect those rights. And should the court below, on petition by the employer, reverse the Board's decision, the Union's statutory rights will be effectively adjudicated and denied.

Here, then, is a very substantial right or interest of the Union at issue in the appellate court proceedings. It is a right that falls within the public policies of the Act, one that has been pursued within the procedural framework of the Act. The Board's exclusive function with respect to the enforcement of that right has at all times been acknowledged. Hence it is the kind of "private right" which can and has been recognized by the Act. And it is the kind of a "private right" so intimately connected with the private concerns of the Union as to justify intervention by the Union in the *Board* proceedings. No less should it be considered as a right so directly involved with the Union's legitimate interests as to require intervention in the *appellate court* proceedings.

Moreover, this "private right" is one to be adjudicated both by the Board and the reviewing court not in abstract terms but as a viable proposition from which legal and statutory consequences flow. See *Rochester*

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[14] The Union had the alternative right under *Smith* v. *Evening News Association*, 371 U.S. 195, and *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, to take its contractual claim to arbitration and from thence to court.

Telephone Corp. v. United States, 307 U.S. 125, 131-132, 143; *Pennsylvania R. Co.* v. *United States,* 363 U.S. 202, 205. If the reviewing court agrees with the Board, the Union will have an authenticated statutory right to demand its own time studies and the Company will be legally obligated to recognize that right. But if the court reverses the Board, the Union loses that right and the Company is freed of any duty to recognize it. Thus the matter in issue before the court below is immediately and legally consequential to the petitioner Union. *Associated Industries of New York* v. *Ickes,* 134 F.2d 694 (C.A. 2); *National Coal Ass'n.* v. *Federal Power Commission,* 191 F.2d 462 (App. D.C.).

In these circumstances, to view the right asserted by the Union as a private matter outside the legitimate concern of the Act is to deny the interrelationships of public and private interests implicit in the statute. The interest which the Union seeks to protect through intervention in the court below has both public and private connotations. And to assert those private connotations in a § 10(f) review proceeding, following their assertion before the Board, is entirely consistent with the pattern, the purpose and the policy of the Act. That consistency, combined with the obviously substantial nature of the asserted right, makes the requested intervention both appropriate and necessary to the full exercise of the court's review power under § 10(f).

C. *Practical Considerations Require Intervention, Upon Request, by a Party Charging Violation of the Labor Act.*

As just indicated, the petitioner Union, as the charging party before the Board, has a substantial interest in the adjudication of its statutory rights. That interest retains its vitality not only in the Board proceedings but

also in any judicial review proceedings under § 10(f), even where the latter proceedings are instituted by the other or "aggrieved" party. The fact is that the statutory rights and claims of such a charging party will in effect be examined by the appellate court and be either recognized or disallowed. That fact generates several practical reasons why intervention should be allowed to the charging party as a matter of effective and expeditious administration of § 10(f).

(1) *The ineffectiveness of subsequent proceedings to protect the charging party's interest.* As in the *Scofield* case, where the charged party's interests are at stake, a determination by the appellate court in this case that the petitioner Union, as the charging party, has no statutory rights with respect to its demand for leave to conduct time studies would have a most prejudicial effect upon any future proceedings. Were the Board order to be reversed and the case remanded to the Board with directions to dismiss the complaint, as the respondent Company urges, the petitioner Union would suffer a substantial injury. The Union would be faced with the loss of its claimed statutory rights and its self-interest in making the time studies.

The Board, however, would then be powerless to consider anew any reiteration of the Union's claims; it would be bound by the appellate remand order to dismiss the complaint. The Union, however, could assume under § 10 (f) the role of a party "aggrieved" by the Board's new dismissal order, but the prospects of any independent or meaningful judicial review of such a dismissal order would be quite minimal. The doctrine of *res judicata* would technically not apply, the Union not having been a party to the earlier review proceedings. But, as the Solicitor General has pointed out in the *Scofield* case with reference to such a subsequent appeal by a charged

party,[15] "as a practical matter the second proceeding would be controlled by the facts found and the legal conclusions reached in the first proceeding". See, e.g., *Henry I. Siegel Co.* v. *NLRB*, 340 F.2d 309, 310 (C.A. 2), where the Second Circuit followed its prior decision, 324 F.2d 228, "as the law of the case" and confined its review "to the two issues determined by the Board on remand."

Thus a judicial determination in this case that the respondent Company has not violated § 8(a)(1) and (5) because the Union has no statutory right to make its own time studies would make empty any subsequent appeal by the Union. Such an appeal would constitute but a futile attempt to have the same or another appellate court rehear and relitigate an issue already decided. The Union would have an intolerable burden of overcoming the established precedent. Such a judicial mirage is certainly no substitute for the right to be heard here and now. See *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327, 330-331. Without according the Union the right to assert and to litigate its interests at this juncture, there can be no assurance that those interests will ever be objectively considered in the light of the Union's contentions or that they will be given the weight in appellate proceedings to which they are entitled.[16]

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[15] Memorandum for the National Labor Relations Board, p. 3, in connection with the Petition for a Writ of Certiorari, *International Union* v. *Scofield*, No. 18, Oct. Term 1965.

[16] This is not to say that the Labor Board attorneys cannot present all relevant legal arguments. But there is more here than statutory construction and legal precedent. In this case, the respondent Fafnir supplied the petitioner Union the results of its own time studies of the four jobs in issue. To succeed in its case, the petitioner Union must demonstrate the necessity for its own time studies. This requires that the reviewing court be informed, knowledgeably, about the techniques of time studies: the ten essential steps in all time study procedure, the types of judgment to be exercised in regard to each step, the alleged judgment errors of the

(2) *The desirability of hearing all interested parties simultaneously and avoiding multiplicity of proceedings.* The most effective and expeditious determination of issues on an appeal, to use the words of this Court in *United States* v. *Louisiana*, 354 U.S. 515, 516, "requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." That principle would seem peculiarly appropriate to the effective resolution of the judicial review proceeding now pending in the court below.

As has been indicated, this entire case centers about the validity of the demand by the petitioner Union that it be allowed to conduct certain time studies. The resolution of that issue, as the Board's opinion demonstrates, involves such matters as the Union's need to conduct the studies in order to judge the accuracy of the Company's studies and to make an intelligent decision whether to proceed to arbitration, the possible interference with production that such Union studies might entail, the possible waiver by the Union of its right to seek such information, the past history of the Union's requests, and the possible alternative sources where the Union might acquire such information. All of these matters are intimately bound up with the Union's self-interests. And the Union can be expected to provide, as it did before the Board, considerable enlightenment upon these various factors that are so critical to the reviewing court's determination. However effective Board counsel may be in reflecting these interests of the Union, the fact remains that it is the Union that knows the most facts in this connection and can best explain their implications to the Union.

To permit intervention by the Union in this type of case "would serve the ends of justice," *Textile Workers Union*

Company in regard to the four jobs at issue, and so on. Information on this score is obviously more accessible to the Union attorneys than to the Labor Board attorneys.

of America v. *Allendale Co.*, 226 F. 2d 765, 770 (App. D.C.), by bringing to the aid of the appellate court the most knowledgeable as well as the most directly affected of the parties involved. In any meaningful sense, this is a tripartite proceeding involving (1) the Board, as the representative of the public interest, (2) the respondent Company, the party charged with having violated the Union's statutory rights, and (3) the petitioner Union, the party whose statutory rights are not only involved but are decisive of the case. To reject the participation of any of those parties, all apart from jurisdictional or equitable considerations, is to deprive the court of the assistance of a vital participant in the controversy. The petitioner Union, for example, may well have supplied the Board with the factual elements and arguments that were in part used in the resolution of the case; and it may provide the insight and the analysis conducive to a full understanding and proper resolution of the case by the appellate court. Certainly in these circumstances no prejudice to the court or to the other parties or to the prompt and effective resolution of the appeal would result from the Union's intervention and participation.

To include the Union as an intervener, bound by the results of the judicial review proceeding, would be further consistent with the sound administration of § 10 (f) by avoiding multiplicity of proceedings. It would eliminate the possibility as well as the futility of the Union seeking an additional appeal from a Board order dismissing the complaint, should the appellate court now reverse the Board's outstanding decree, and raising anew its statutory claims. Such a consideration strongly supports the propriety of permitting intervention at this stage. *Textile Workers Union of America* v. *Allendale Co., supra.*

(3) *The desirability of permitting the charging party to have the full appeal rights of a party to the case.* Pre-

cisely because a charging party has statutory rights, claims and interests that are directly involved in the appellate review proceeding, it becomes a matter of fundamental fairness if not due process to permit him to intervene as of right. It being apparent that such a party's statutory rights are about to be authoritatively adjudicated, the accepted notions of appellate court equity require that "all parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal." *Davis* v. *Mercantile Trust Co.*, 152 U.S. 590, 593.

This "opportunity to be heard on such appeal" means, of course, something more than leave to file a brief *amicus curiae*. It means full participation as a party, with the right to participate in the designation of the record, in the pre-hearing conference where issues are simplified, to make motions, file briefs, argue orally, and seek rehearing. And it means the right to have status to seek certiorari from this Court in order to accord the party's interest the benefits of the entire appellate process. Only a party who is named as such or who is allowed to intervene can have those full rights; an *amicus curiae* does not possess them.[17] And only a party possessing all those procedural rights can fully and effectively represent its interests at issue in the proceeding.

The standing to seek the ultimate review of a case by this Court is critical to the effectuation of the legal and statutory interests of the petitioner Union. As an intervener, the Union would have the right to invoke this Court's certiorari power. *International Union* v. *Eagle-Picher Min-*

[17] An *amicus curiae* is generally thought of not as a party who is directly involved in the case but as a party with a case or interest similar to or identical to the one actually before the court. The *amicus curiae* concept has also been utilized on behalf of organizations with general rather than direct interests in the case at hand. See Wiener, The Supreme Court's New Rules, 68 Harv. L. Rev. 20, 80 (1954).

ing Co., 325 U.S. 335, 338-339. And it could seek it in circumstances where the Board might decide not to ask for such review. See *United Steelworkers* v. *Labor Board*, 376 U.S. 492. But if the Union were denied intervention below and the Board were to decide not to seek this Court's reversal of an adverse appellate decision, the Union would be effectively foreclosed from carrying its timely claims to this Court, claims which of necessity are the very core of the proceeding.

Permitting intervention below would have the further advantage of assuring that all parties in interest would be before this Court when any attempt is made to secure a writ of certiorari and when, if certiorari is granted, a full review of the case is undertaken. Just as the lower court would benefit from the participation of all such parties, so too the effective determination of the issues "requires that they be adjudicated in a proceeding in which all the interested parties are before this Court." *United States* v. *Louisiana*, 354 U.S. 515, 516. To truncate the effective representation of the interests at stake in this Court by omitting a vital party is to drain the certiorari case of an essential element and to make this Court's task more difficult. And to force the omitted party to seek some other and perhaps futile means of securing review of its claims—at a point divorced in time from the present proceeding—is to weaken still further that party's chances of a meaningful presentation of its claims to this Court.

Intervention below thus means that the entire controversy will be centralized and confined in one proceeding, enabling both the court below and this Court to review all the relevant issues in the light of the contentions of all the interested parties—including the accused wrongdoer and the injured accuser.

(4) *The desirability of eliminating fortuity as the decisive factor in the charging party's right to participate in the appellate proceeding.* There could be no question as to

the charging party's status as an "aggrieved" party under § 10(f) had the Board dismissed the complaint against the respondent Company. See *Albrecht* v. *N.L.R.B.*, 181 F.2d 652, 654 (C.A. 7). Then the Union would have had the right to seek judicial review of the dismissal and to participate in the case as a full-fledged party. And in that event the charging party could seek or oppose this Court's ultimate review of the case.

Yet the statutory claims and rights that the Union would be asserting as such an "aggrieved" party are precisely the same as the claims and rights it is now seeking to assert. Those claims and rights are imbued with the same "public interest" in either instance. The only difference is that no one would question the right of the Union to pursue those statutory or private interests had the Union, as the charging party, lost its case before the Board. But because the Union was able to convince a majority of the Board that its statutory rights should be recognized and that the respondent Company had violated those rights, the court below and the Board assert that the Union has no interest at stake to justify intervention.

Permitting the fortuity of the administrative determination to control the right of intervention injects a most capricious element into the Congressional policy of adjudicating the conflicting claims of labor and management in this area. And when there is added to that chance circumstance the additional fortuity that the respondent Company, as the "aggrieved" party seeking review, chanced not to name the Union as a party on appeal (as it could have done), the resulting denial of intervention becomes a most incongruous action. Intervention should be based upon the substantial factor of the Union's direct involvement and interest in the proceeding, a factor that recognizes reality rather than fortuity.

(5) *The desirability of allowing intervention in order to*

conform to the general Congressional policy favoring intervention. Congress on numerous occasions has exhibited a strong policy favoring intervention in both administrative and judicial proceedings by parties directly involved and affected thereby. Section 10(b) of the Act, 29 U.S.C. § 160(b), directs the Board to exercise discretion in allowing intervention in Board proceedings, a direction that the Board has interpreted (Rules and Regulations, Sec. 102.8) as giving the charging party full status on a parity with the charged party. And in providing in § 10(1) of the Act, 29 U.S.C. § 160(1), for certain injunctive proceedings pending completion of the unfair labor practice procedure before the Board, Congress made plain that the Board's petition for judicial relief should be served "upon any person involved in the [unfair labor practice] charge and such person, *including the charging party,* shall be given an opportunity to appear by counsel and present any relevant testimony." [Emphasis added.]

Moreover, in providing for judicial review of the actions of such agencies as the Interstate Commerce Commission, the Atomic Energy Commission, the Federal Communications Commission and other agencies covered by the Urgent Deficiencies Act of 1913, Congress has directed that all parties in interest in the administrative proceedings be allowed to intervene on their own motion and as of right in the judicial review proceedings. See 28 U.S.C. § 2323; 5 U.S.C. § 1038. These provisions constitute the major expression of Congress on the matter of intervention in these circumstances. And the expression is one of acknowledging and guaranteeing an absolute right of intervention for those who have an interest in and were parties to the administrative proceedings.

As stated in the petitioner's brief in the *Scofield* case, this broad intervention policy adopted by Congress must be viewed as grounded upon the considerations of equity

and fairness which necessarily adhere to the demand of an interested party to be heard. And when that policy is added to the same policy enunciated in Rules 19 and 24 of the Federal Rules of Civil Procedure, dealing with the concepts of indispensable parties and intervention in federal district courts, it becomes reasonable to read that policy into the judicial review provisions of § 10(f) of the National Labor Relations Act. The silence of § 10(f) with respect to intervention cannot be taken as a rejection of the uniform policy favoring intervention adopted whenever Congress expressly directed its attention to that subject.

(6) *The inappropriateness of distinguishing the intervention rights of a charging party from those of a charged party.* The foregoing practical considerations dictate the propriety of allowing intervention as of right to the party who has initiated the charge before the Board and whose statutory rights and interests are directly in issue. In this context, the relevant considerations are virtually identical to those which underlie the appropriateness of allowing the charged party to intervene in the appellate proceedings.

The Board, however, seeks to distinguish the two situations, urging that intervention by the charging party would endanger the integrity of the statutory pattern whereas intervention by a charged party would not. See Brief of the Board, pp. 7-8, 21-25, 26-30. Such a distinction is without foundation. Intervention in either situation would have the same practical consequences—the intervener could participate in the designation of the record, file a brief, present oral argument, and possibly petition for certiorari. To say, as the Board does (Brief, pp. 28-30), that the charging party would be more likely than the charged party to block settlement of a case or to prolong the litigation contrary to the wishes of Board counsel is

to engage in a fanciful conjecture. The right to intervene rests upon more solid foundation than speculation as to whether the intervener will cooperate with Board counsel or will expedite the litigation. A court has the power to control such matters, whatever position individual counsel may take as to the progress of a case. Intervention rests on a recognition of the real interests in issue and the fairness involved in resolving a case when all affected parties are before the court. On that basis, no valid distinction can be made between a charged party and a charging party.

In sum, the Board's brief concedes the power of this Court to require the intervention of the charging party and simply makes a naked plea of inconvenience.[18] But such a plea weighs little in the scales when balanced against the rights and policy considerations requiring intervention. As concluded by the distinguished Advisory Panel quoted earlier (p. 16, *supra*), "any party to NLRB proceedings should be allowed to intervene in the appellate proceedings."

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[18] Appendix C of the Government's brief indicates that no distinction is made between a charged and a charging party in the judicial review provisions of other administrative agencies. Congress has either made specific statutory provision for intervention by all parties in interest (Brief, pp. 45-47), or, in the absence of explicit statutory direction, the agencies consent to the intervention by interested parties and the courts generally grant intervention (Brief, pp. 48-49). The Government seeks to distinguish Labor Board review proceedings from the judicial review proceedings of all other administrative agencies on the basis of case-load and volume (Brief, p. 44), but "budgetary or other administrative reasons" do not justify denial of statutory rights. *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1.

Conclusion

For these various reasons, the judgment below should be reversed with directions to permit the petitioner Union to intervene as of right in the proceedings pending in the Court of Appeals.

Respectfully submitted,

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